

83 - 1518

No. ...

IN THE

Supreme Court of the United States

October Term, 1984

Office - Supreme Court, U.S.
FILED
MAR 14 1984
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CLERK

JOHN HEILIG, THOMAS E. COLLINS, III, WILSON D. KEY,
RAYMOND VISSOTZKY, RICHARD P. KEIRN, HUBERT
BUCHANAN, MICHAEL P. CRONIN, NORMAN WELLS, ROSS
R. TERRY, GEORGE THOMAS COKER, JAMES BELL, THEO-
DORE W. GUY, STEPHEN LONG, THOMAS J. KLOMANN,
JAMES H. WARNER, KENNETH L. COSKEY, LOUIS H.
BERNASCONI, ELMO C. BAKER, RONALD J. WEBB, RON-
ALD E. BYRNE, JR., JAMES A. MULLIGAN, DAVID A.
EVERETT, GEORGE R. HALL, JOSEPH E. MILLIGAN,
J. R. MCKAMEY, ROBERT I. RANDALL, DANNY GLENN,
LEWIS I. WILLIAMS, and JAMES E. RAY,

Appellants,

vs.

EDISON W. MILLER,

Appellee.

On Appeal From the Court of Appeal of the
State of California, Fourth Appellate District,
Division One.

JURISDICTIONAL STATEMENT.

PARKER, STANBURY, MCGEE,
BABCOCK AND COMBS,
GEORGE H. BABCOCK,
1200 North Main Street,
Suite 716,
Santa Ana, Calif. 92701,
(714) 547-7103,

Counsel for Appellants.

Question Presented.

1. May a California Court consistent with the 14th Amendment exercise jurisdiction over non-resident defendants solely because the complaint alleges that an intentional act was performed out of state causing an alleged tortious effect in state?

Parties to the Proceeding Below.

The appellants were petitioners in the Court of Appeal, Fourth Appellate District, Division One; the proceeding in that court was a petition for writ of mandate.

The appellee, EDISON W. MILLER, was the real party in interest in that proceeding.

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Appellants,

vs.

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Appellee.

JURISDICTIONAL STATEMENT.

Opinions Below.

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is printed in Appendix A hereto and is reported at 149 Cal. App. 3d 978, ___ Cal. Rptr. ___ (1983).

Jurisdiction.

The nature of the proceeding below is a libel action by the appellee, EDISON W. MILLER, against, amongst others, the appellants. Appellee and all of the appellants

were prisoners of war held by the North Vietnamese during the Viet Nam war. Appellee ran for political office in California. Appellants, all non-California residents, signed a letter commenting upon appellee's conduct while a POW. This letter was circulated by others among the voters in the election. Appellee alleges that the contents of the letter were defamatory and filed the lawsuit from which the present proceeding has arisen.

The order appellants seek to have reviewed is dated December 15, 1983, and was entered on that date. A hearing in the California Supreme Court was denied by order dated February 23, 1984. The notice of appeal herein was filed on March 12, 1984 in the Court of Appeal of the State of California, Fourth Appellate District, Division One.

The jurisdiction of this court is invoked under Section 1257(2) of Title 28 of the *United States Code*.

The essence of the challenge below was that California *Code of Civil Procedure* §410.10, as applied to the appellants, violates the 14th Amendment of the United States Constitution. The following cases sustain jurisdiction: *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1978). *Dahnke-Walker Company v. Bondurant*, 257 U.S. 282 (1921).

A copy of the order on hearing by the California Supreme Court, and of the notice of appeal is included in Appendix B, appended hereto.

Statute and Constitutional Provisions Involved.

California *Code of Civil Procedure* §410.10 provides as follows:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

The 14th Amendment of the United States Constitution provides as follows:

Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

Statement of the Case.

This appeal arises from an election that was held in the County of Orange, State of California, in 1980. The election was for the position of Supervisor for the Third District of the County of Orange. The appellee, EDISON W. MILLER, was running against Bruce Nestande for that position.

Appellee and the appellants were prisoners of war held by the North Vietnamese during the Viet Nam war.

During the election, a letter was circulated amongst the voters of the Third District in the County of Orange. This letter was signed by more than 200 former prisoners of war. The letter commented upon the POWs' impressions of the conduct of their fellow POW, EDISON W. MILLER. No evidence was presented to the courts below on how the letter was transmitted from POW to POW or how it was circulated to the voters.

Each of the appellants is a non-resident of the State of California and each of the appellants signed the letter outside of the State of California. None of the appellants have sufficient contact with the State of California to establish general jurisdiction.

A defamation lawsuit arose from the circulation of the letter. Service was effected on appellants and appellants

thereafter filed motions to quash service of summons in the Superior Court for the State of California, County of Orange. The motions to quash were denied. A Petition for Writ of Mandate was filed. This Petition was denied in the opinion found in the Appendix. A Petition for Hearing in the California Supreme Court was thereafter filed and denied by that court.

Substantiality of Federal Questions.

This court has not previously ruled on the question of a state asserting jurisdiction against an individual non-resident defendant based solely upon a single act by the non-resident defendant which occurred outside the forum state. The opinion from the court below indicates that jurisdiction was found because an intentional tortious act and a tortious effect were alleged in the complaint: jurisdiction may not be shifted to the province of complaint drafting, it must be found on a purposeful availment of state privileges and benefits. The courts below dispensed with a finding of purposeful availment because of the allegations of the complaint. This is an unconstitutional extension of the state power. It is important that this court consider these issues to provide guidance to the state courts on the extent of state jurisdiction.

This court is currently considering a case somewhat analogous to the present appeal, that case being *Calder v. Jones*, 82-1401. A distinction between *Calder* and the present appeal is that the appellants here do not have any media connections and the conduct of the appellants did not arise within the course and scope of their employment with a national corporation. This case presents, therefore, a variation from the *Calder* issues, calling for plenary consideration, with briefs on the merits and oral argument, for their resolution.

Conclusion.

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

DATED: March 13, 1984.

Respectfully submitted,

PARKER, STANBURY, MCGEE,

BABCOCK AND COMBS,

By GEORGE H. BABCOCK,

Counsel for Appellants.

APPENDIX A.

Opinion.

Court of Appeal, Fourth Appellate District, Division One,
State of California.

John Heilig, Petitioner, v. Superior Court, Orange County,
Respondent; Edison W. Miller, Real Party in Interest.
4 Civ. No. 31336 (Super. Ct. No. 33-55-22).

Thomas E. Collins, et al., Petitioners, v. Superior Court,
Orange County, Respondent; Edison W. Miller, Real Party
in Interest. 4 Civ. No. 31350 (Super. Ct. No. 33-55-22).

Filed December 15, 1983.

Petitions for writs of mandate, Judith Ryan, Judge. Writs
denied and stay vacated.

Parker, Stanbury, McGee, Babcock & Combs and Robert
A. Walker for Petitioners.

Richard V. McMillan for Real Party in Interest.

Petitioners in these consolidated proceedings for writs of
mandate are former prisoners of war (POW and POW's)
captive for periods of a few months to eight years in North
Vietnamese prisons. Edison W. Miller, real party in interest,
also a POW, was appointed to fill a vacancy on the Board
of Supervisors of Orange County, Third District, and at
relevant times here was seeking election to that office. The
petitioners, all of whom are nonresidents of California, with
other POW defendants, signed a letter sent to Third District
voters urging Miller's defeat on the ground he cooperated
with the North Vietnamese to the detriment of other POW's
by writing articles for the enemy and broadcasting a message
over Radio Hanoi supporting North Vietnam. The letter also
charged Miller violated his oath as an officer, disobeyed
lawful orders of his superiors and lacked dedication to duty
or a sense of service necessary for qualification to a public
office.

Miller was defeated by Bruce Nestande and sued the signers of the letter and others alleging damages, negligence, intentional infliction of emotional distress and defamation. The petitioner POW's were served out-of-state and the court denied their motions to quash service. These writ proceedings ensued. We stayed proceedings in one case pending hearing. We now deny the writs and vacate the stay.

I

We do not address the merits of Miller's complaint. We do not adjudicate the charges made against Miller by the POW's. Those issues await further proceedings in the trial court. At this stage, we simply decide the California court can proceed with the lawsuit.

II

Two proceedings are before us. John Heilig, a POW defendant, is the petitioner in case 4 Civ. No. 31336 filed in Division Three of this District. After that division denied his writ and application for a stay, the Supreme Court granted a hearing, ordered issuance of an alternative writ and re-transferred to Division Three. The case was then transferred to us. Thomas Collins III and 27 other POW's are the petitioners in case 4 Civ. No. 31350 initially filed in Division Three and then transferred to this division. As the petitions present identical issues, we consolidate them for disposition.

III

None of the POW's were residents of California when they signed the letter. All of them were residing in states other than California. Each of them visited California at various times. Some of them lived in California for one or

more years while serving in the armed forces; others were in California on brief duty assignments. All of them signed the letter in states other than California. Some made phone calls to and received phone calls from California about the letter; others did not. All of them obtained information about Miller as reflected in the letter while captives of the North Vietnamese forces.

IV

A copy of the letter (without all of the signature pages) is attached. The letterhead is "POW-American Prisoners of War-American Former POW's Against Edison Miller-17671 Fitch, Irvine, Ca 92715." The letter is addressed to "Dear Fellow Americans." It was mailed to more than 100,000 registered voters in the Third District. The letter is crystal clear in meaning. The signers urge California voters to reject Miller. The letter, wherever signed, was intended to be and was mailed in California to California voters to defeat a California candidate for a California public office. The letter had the desired effect. Miller was defeated.¹

V

As noted, we do not address the merits of Miller's complaint which pleads tortious conduct in negligence, infliction of emotional distress and defamation. We inquire whether California may exercise jurisdiction over the nonresident POW letter signers. Under Code of Civil Procedure section 410.10, a California court may exercise jurisdiction over nonresidents on any basis not inconsistent with the United States or California Constitutions. Code of Civil Procedure section 410.10 manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations. (*Buckeye Boiler Co. v. Superior Court* (1969) 71

¹We judicially notice the election results.

Cal.2d 893.) As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has minimal contacts with the state such that “. . . the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ” (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-317; *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.)

Extensive or wide-ranging activities of a nonresident defendant, or substantial, continuous and systematic activities warrant jurisdiction over a nonresident defendant for all causes of action. (*Buckeye Boiler Co. v. Superior Court*, *supra*, 71 Cal.2d 893, 898-899; *Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, 447-448.) Absent such pervasive activities, jurisdiction depends upon the quality and nature of the nonresidents’ activity in the forum in relation to the particular cause of action.

“In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. [Fn. omitted.] The crucial inquiry concerns the character of defendant’s activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction.” (*Cornelison v. Chaney*, *supra*, 16 Cal.3d 143, 148.)

One of the recognized bases for jurisdiction in California arises when the defendant has caused an "effect" in the state by an act or omission which occurs elsewhere.

"This ground for assertion of jurisdiction is discussed by the Judicial Council in its comment to section 410.10 of the Code of Civil Procedure reprinted in West's Annotated California Codes, page 472, in the following language: 'A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects, *unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.* [Citations.] When jurisdiction over an individual is based solely upon such act or omission, only a claim for relief arising from such act or omission may be asserted against the individual. [Citation.]' " (Original italics.) (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 446.)

Sibley was an action for a breach of contract, and the court held the exercise of jurisdiction unreasonable because the defendant did not purposefully avail himself of the privilege of conducting business in California or of the benefits and protections of California laws. Further, the defendant did not anticipate any economic benefit as a result of California dealings, and no aspects of the transaction were subject to California regulation.

Here, Miller's complaint charges the POW defendants engaged in tortious conduct against him, a California resident. That conduct is the signing by the various POW defendants of the letter in states other than California, knowing the letter would be mailed in California to California residents and voters. In *Abbott Power Corp. v. Overhead Electric Co.* (1976) 60 Cal.App.3d 272, the sending of three letters into California from a sister state, the effect of which

was to cause an intentional interference of the contractual relationship, was held to be the doing of a significant act in California by reason of the effect of the receipt of the letters here. *Abbott Power* enumerates the factors to be considered in determining whether it is fair to exercise jurisdiction over a defendant who resides in another state. These include the relative availability of evidence and the burden of defense and prosecution in one place rather than another, the interest of a state in providing a forum for its residents, the ease of access to an alternative forum, the avoidance of a multiplicity of suits and conflicting adjudications and the extent to which the cause of action arose out of defendant's local activities.

Here, the publisher of the letter, American POW's Against Edison Miller, shows an address in Irvine, California, from which the letter was mailed in Orange County to Orange County voters in the Third District. The letter itself is evidence of the claimed defamation. Miller, his physicians, family, and associates will doubtless be witnesses as to infliction of emotional distress. Evidence bearing on the negligence cause of action would come in part from California sources. The many defendants suggest a multiplicity of actions and conflicting adjudications should California not be the forum. Clearly, Miller's claimed damages arise out of the mailing of the letter and its receipt by voters in Orange County. *Abbott Power* distinguished *Sibley*, pointing out the breach of contract cause of action there required forum-based activities on the part of defendant such as to invoke the benefits and protections of the laws of the forum or activity as a result of which the defendant could anticipate economic benefit.

"There is no reason to require any special circumstances where, as here, the conduct charged is an intentional and malicious tort against a forum-based cor-

puration. [Fn. omitted.] The fundamental question is whether the exercise of jurisdiction is fair and reasonable. It is just as reasonable and fair, maybe more so, to subject a defendant to the jurisdiction of a state when it engages in conduct which is purposefully intended to harm a resident of that state as it is to subject a defendant to the jurisdiction of a state when that defendant has sought or anticipated economic benefit in that state from its out-of-state activities." (*Abbott Power Corp. v. Overhead Electric Co.*, *supra*, 60 Cal.App.3d at pp. 281-282.)

In *Schlussel v. Schlusser* (1983) 141 Cal.App.3d 194, the making of obscene and threatening telephone calls by a nonresident to persons resident in California resulting in a claim for damages for emotional distress invoked the jurisdiction of the California court.

"Thus, the rule we apply is that where the effect giving rise to the tort is intentionally caused, jurisdiction is justified unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable [citations]." (*Id.*, at p. 197.)

We there pointed out the making of anonymous obscene telephone calls is a misdemeanor under Penal Code section 653m and concluded the placing of a criminal telephone call invokes the jurisdiction of the California court as calls of that nature are deemed exceptional and subject to special regulation. (*Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296.)

VI

We conclude the nonresident POW defendants, petitioners here, signed the letter knowing the letter would be mailed from Orange County to Orange County voters resident in the Third District for the express purpose of causing them

to reject Miller's candidacy. This out-of-state act resulted in conduct in California tortious in nature. Considering all of the circumstances, we conclude it is fair and reasonable to subject the POW defendants to the jurisdiction of the California courts. The writs are denied, and the stay is vacated.

CERTIFIED FOR PUBLICATION.

/s/ Butler
BUTLER, J.

WE CONCUR:

/s/ Brown
BROWN, P.J.

/s/ Cologne
COLOGNE, J.

EXHIBIT "A".

POW
AMERICAN
PRISONERS
OF WAR

American Former POW's Against Edison Miller
17671 Fitch, Irvine, Ca 92715

Dear Fellow American:

Each and every one of us is a former American Prisoner of War. We were held for periods ranging from a few months to over 8 years in Communist North Vietnamese prisons.

Each and every one of us was aware that Edison W. Miller was also held with us as a Prisoner of War in Communist North Vietnam.

Each and every one of us urges you to vote against Edison W. Miller in his campaign for County Supervisor, or any other public office Edison W. Miller might seek.

Do you know that Edison W. Miller cooperated with the enemy to the detriment of his fellow American Prisoners of War?

Do you know that Edison W. Miller wrote articles for the Communist North Vietnamese that were against the interests of his government and against the interests of his fellow POW's?

Do you know that Edison W. Miller willingly made a tape recording that was broadcast over Radio Hanoi that supported the Communist North Vietnamese?

We, who were there, know. We also know that in doing these things, Edison W. Miller violated his oath as a Military Officer, and disobeyed the lawful orders of his superiors.

It is clear to each of us that Edison W. Miller does not have the dedication to duty, to his country, or to a sense of service which would qualify him for *any* public office.

We are not politically active as a group. We now live all across this great nation. However, on the issue of Edison W. Miller, we all have one thing in common:

We cannot believe any patriotic group of Americans would select a person like Edison W. Miller for any position of public trust.

Please, in the interest of integrity in public office, we urge you to reject Edison W. Miller.

Most Sincerely,

/s/ John P. Flynn

John P. Flynn

Captured 27 Oct. 67

Repatriated 14 Mar. 73

/s/ W.P. Lawrence

W.P. Lawrence

Captured 6/28/67

Repatriated 3/4/73

APPENDIX B.

Order.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Feb. 23, 1984

I have this day filed Order In re: HEARING DENIED 4 Civ. No. 31336, JOHN HEILIG, et al. vs. Superior Ct., Orange (EDISON W. MILLER).

*Respectfully,
Clerk*

APPENDIX C.

Notice of Appeal.

In the Court of Appeal of the State of California, Fourth Appellate District, Division One.

John Heilig, Thomas E. Collins, III, Wilson D. Key, Raymond Vissotzky, Richard P. Keirn, Hubert Buchanan, Michael P. Cronin, Norman Wells, Ross R. Terry, George Thomas Coker, James Bell, Theodore W. Guy, Stephen Long, Thomas J. Kломann, James H. Warner, Kenneth L. Coskey, Louis H. Bernasconi, Elmo C. Baker, Ronald J. Webb, Ronald E. Byrne, Jr., James A. Mulligan, David A. Everett, George R. Hall, Joseph E. Milligan, J. R. McKamey, Robert I. Randall, Danny Glenn, Lewis I. Williams, and James E. Ray, Petitioners, vs. Superior Court of the State of California for the County of Orange, Respondent, Edison W. Miller, Real Party In Interest. 4 CIV 31336 (Super.Ct.No. 33-55-22).

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that JOHN HEILIG, THOMAS E. COLLINS, III, WILSON D. KEY, RAYMOND VISSOTZKY, RICHARD P. KEIRN, HUBERT BUCHANAN, MICHAEL P. CRONIN, NORMAN WELLS, ROSS R. TERRY, GEORGE THOMAS COKER, JAMES BELL, THEODORE W. GUY, STEPHEN LONG, THOMAS J. KLOMANN, JAMES H. WARNER, KENNETH L. COSKEY, LOUIS H. BERNASCONI, ELMO C. BAKER, RONALD J. WEBB, RONALD E. BYRNE, JR., JAMES A. MULLIGAN, DAVID A. EVERETT, GEORGE R. HALL, JOSEPH E. MILLIGAN, DAVID A. EVERETT, GEORGE R. HALL, JOSEPH E. MILLIGAN, J. R. McKAMEY, ROBERT I. RANDALL, DANNY GLENN, LEWIS I. WILLIAMS, AND JAMES E. RAY,

hereby appeal to the Supreme Court of the United States from the final decree of this court entered on December 15, 1983, hearing on which was denied by the California Supreme Court on February 23, 1984.

This appeal is taken pursuant to section 1257 (2) of Title 28 of the *United States Code*.

DATED: March 9, 1984

PARKER, STANBURY, McGEE,
BABCOCK AND COMBS
/s/ BY: GEORGE H. BABCOCK
Attorney for Petitioners